Office-Supreme Court, U.S.
FILED
OCT 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 562

MILTON E. SPATT,

Appellant,

—against—

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York, and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

CHARLES E. BERNSTEIN,
Attorney for Appellant,
16 Court Street,
Brooklyn 1, N. Y.

THE ALPERT PRESS, INC. — TRIANGLE 5-1058-1059

INDEX

PAGE

Statement 1

Opinions Below 2

Jurisdiction 2

Questions Presented 4

Statement of the Case 5

How Federal Questions Were Presented 6

The Questions are Substantial 7

Conclusion 10

Appendix A ..... A-1 to A-7

Decision of Court of Appeals A-1

Opinion of Appellate Division A-1

Opinion of Special Term A-5

Appendix B ..... A-8 to A-10

Compensating Tax Use—M41 16.0 ..... A-8

Sales Tax—N41-1.0, N41-2.06 ..... A-9

Article 42 of the Rules and Regulations of the Comptroller A-10

TABLE OF CASES

Commonwealth v. Smith, 75 Dauph. 22 9

Freeman v. Hewit, 329 U. S. 249 3

PAGE

Gregg Dyeing Co. v. Query, 286 U. S. 472 8

Halliburton Oil Well Cementing Co. v. State of Louisiana, 373 U. S. 64 7

Henneford v. Silas Mason Co., Inc., 300 U. S. 577 3

Independent Warehouses v. Scheele, 331 U. S. 70 3

King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100 3

Lathrop v. Donohue, 367 U. S. 820 3

Memphis Steam Laundry Cleaners, Inc. v. Stone, 327 U. S. 416 3

Mullaney v. Anderson, 342 U. S. 415 8

Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 3

IN THE

Supreme Court of the United States

No. .....

MILTON E. SPATT,

Appellant,

—against—

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York, and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

STATEMENT

Appellant appeals from a final judgment of the Supreme Court of the State of New York, County of Kings, entered on the 22nd day of May, 1963, pursuant to the remittitur and decision of the Court of Appeals of the State of New York dated May 2nd, 1963, which affirmed the order and judgment of the Appellate Division of the State of New York, Second Judicial Department.

The order and judgment of the Appellate Division of the State of New York, Second Judicial Department, reversed the judgment of the Supreme Court of the State of New York, County of Kings.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is reported at 13 N. Y. 2d 618, 240 N. Y. S. 2d 605. The opinion of the Appellate Division of the State of New York, Second Judicial Department is reported at 14 A. D. 2d 30, 218 N. Y. S. 2d 409. The opinion of the Trial Court is reported at 24 Misc. 2d 978, 203 N. Y. S. 2d 549.

Copies of the foregoing opinions are attached hereto as Appendix "A", pages A-1 to A-8, *infra*.

JURISDICTION

This is an action for a judgment declaring the regulations of the Comptroller of the City of New York issued under the New York City Compensating Use Tax Law as well as its underlying statute to be invalid as they apply to the purchase price of an automobile where part of the consideration is a trade-in used car. This action is authorized by Section 473, Civil Practice Act, State of New York.

The Court of Appeals held that the Comptroller of the City of New York could levy a greater tax on a resident who purchased an automobile outside the City of New York when he pays part of the purchase price with a traded in car, than a resident who makes the identical purchase within the City of New York. The Court held, in fact, that the Comptroller had the right to discriminate against the out

of town purchaser because there was a basis for the classification.

The issue is whether or not the discriminatory tax is offensive to the Constitution of the United States, particularly the 14th Amendment. The Trial Court held that the statute denied the plaintiff due process of law and equal protection of the laws as guaranteed by the 14th Amendment of the United States. The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, reversed the judgment of the Trial Court and held that there was sufficient basis for the classification of taxpayer. The Court of Appeals of the State of New York affirmed the Appellate Division in a brief memorandum opinion.

The Court of Appeals rendered its decision on May 2nd, 1963. The judgment, pursuant to the remittitur of the Court of Appeals was entered on May 22nd, 1963. Notice of appeal to the Supreme Court of the United States was timely served and filed in the Supreme Court of the State of New York, County of Kings, on the 11th day of July, 1963, the Court in which the record is filed.

The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28, United States Code, Section 1257 (2); Federal Code Annotated, Title 28, Section 1257 (2). The following decisions sustained the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of the State of New York, based on the remittitur of the Court of Appeals of the State of New York on direct appeal (*Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577; *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450; *Memphis Steam Laundry Cleaners, Inc.* v. *Stone*, 342 U. S. 389; *Nippert* v. *City of Richmond*, 327 U. S. 416; *Freeman* v. *Hewit*, 329 U. S. 249; *Lathrop* v. *Donohue*, 367 U. S. 820; *King Manufacturing Co.* v. *City Council of*

Augusta, 277 U. S. 100; *Independent Warehouses* v. *Scheele,* 331 U. S. 70).

The regulation of the Comptroller of the City of New York, Article 42, and the provisions of the Administrative Code of the City of New York, Section M. 41—16.0, N41-1.0, N41.20, are the statutes which are under attack in this appeal. Copies of the regulation and statute are annexed hereto as Appendix "B".

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether or not the City of New York, through its Comptroller, may apply its complementary—sales tax—use tax scheme, so that the burden thereof bears more heavily upon a resident taxpayer who purchased without the City of New York than one who makes the identical purchase within the City of New York;

2. Whether or not the Supreme Court of the State of New York may constitutionally render a judgment which approves and authorizes the City of New York to discriminate between residents of said City so as to tax the residents of said City differently solely on the basis of the situs of the purchase;

3. Whether or not the regulations of the Comptroller of the City of New York pursuant to the Administrative Code of the City of New York, which require residents of the City of New York to be taxed more heavily when the purchase of an automobile is made outside of said City, than a resident who makes the identical purchase within the City, is offensive to and repugnant to and violative of the Constitution of the United States, including but limited to the following clauses thereof:

a) *The Due Process Clause,* being a portion of the Fourteenth Amendment of the Constitution of the United States;

b) *The Equal Protection of the Laws Clause,* being a portion of the 14th Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

Briefly, appellant, a resident of the City of New York, purchased an automobile in Nassau County, New York State (outside the City of New York) for the sum of $8,250.00, and brought the automobile back with him for use within the City of New York. In making the purchase, the appellant traded in his used car and received a credit of $4,900.00. Therefore, he paid the balance of $3,350.00 in cash.

Instead of paying a compensating use tax on the full amount of the purchase, as required by the local tax law and the regulations of the Comptroller of the City of New York, appellant paid a use tax of $100.50 computed on only the cash amount of the purchase. As a result, the Comptroller of the City of New York assessed appellant the sum of $147.00, the balance alleged to be due on the use tax.

It is agreed by all parties that had the appellant made this identical purchase and trade-in within the City of New York, the sales tax due would have been computed solely on the cash consideration paid. In other words, in a use tax situation, the tax is computed on the entire purchase price, including the credit for the value of a similar article traded in. In the sales tax situation, only the cash consideration is the tax base, as the value of a traded in similar article is not included.

The sole basis for this differential tax treatment is alleged to be based upon an increase in cost of enforcement; stimulation of sales within the City of New York; and the likelihood that the traded in vehicle would be purchased within the City of New York and subject to another sales tax. However, nowhere in the record is there any factual basis for these conclusions.

HOW FEDERAL QUESTIONS WERE PRESENTED

Appellant commenced an action for a declaratory judgment to declare the regulations and underlying statutes unconstitutional, in violation of both the constitutions of the United State and the State of New York. This contention was raised in the initial pleadings and in all the Appellate courts.

The following is quoted from the appellant's complaint in the instant action:

> "TWELFTH: That the said regulation is illegal, invalid, void, not binding upon the plaintiff, and unconstitutional in that it violates the Constitution of The State of New York and the United States by denying to the plaintiff the equal protection of the laws for the reason that the classification by the Comptroller in the said Article 42 is capricious, arbitrary, discriminatory, and class legislation in relation to the plaintiff.
>
> "THIRTEENTH: That the said regulation is invalid, void, not binding upon the plaintiff, and violates the Constitution of the State of New York and the United States by depriving plaintiff of his property, without due process of law and for a public purpose without just compensation."

The Appellate Division of the Supreme Court of the State of New York stated, in the opinion of the Court, that the constitutional issues were raised therein. The Court said:

> "Heavier taxes on nonresidents than on residents have been held not violative of the equal protection clause which they might be regarded as: (a) payment for rendition of public services which had been availed of (Travellers' Ins. Co. v. Connecticut, 185

U. S. 364; Haavik v. Alaska Packers Assn., 263 U. S. 510); (b) an attempt to bring back business loss as the result of a prior tax system or a means by which to defray extra cost of collection (Madden v. Kentucky, 309 U. S. 83); (c) encouragement of location within the state of useful industries (Allied Stores of Ohio v. Bowers, supra); or (d) a means of inducing the labor population to remain (William v. Fears, 179 U. S. 270, 276)."

The Court of Appeals in its decision stated:

> "There was sufficient basis for the classification for a different tax treatment of trade-in automobiles in transactions taking place outside the City of New York by reason of the greater cost of enforcing the compensating use tax and the greater likelihood of resale of the used car within the City of New York. We pass on no other question."

THE QUESTIONS ARE SUBSTANTIAL

In a recent decision of this Court, it was held that a similar discriminatory tax was an unconstitutional burden on interstate commerce (*Halliburton Oil Well Cementing Company* v. *State of Louisiana*, 373 U. S. 64). That case was decided eleven days after the decision of the Court of Appeals of the State of New York in holding the tax in the instant case valid. In *Halliburton*, the discrimination was effected by imposing labor and overhead as part of the cost basis for the use tax, but excluding it from the cost basis in the sales tax. The effect in both *Haliburton* and the instant case is to make the taxpayer under the use tax pay a greater tax than the taxpayer under the sales tax.

In the factual pattern of this case, there was no interstate transaction. However, the Comptroller's regulations and Administrative Code apply with equal force to an out

of State purchaser as to a purchase within the State. Thus, there can be no question that the statute as it applies to an out of State purchaser is prohibited under the *Haliburton* doctrine.

Since the instant transaction, as stated before, was made only within New York State, appellant's main thrust has been the denial of equal protection of the laws. The classification upon which the tax scheme of the New York City use—sales tax is based, is arbitrary and capricious.

It should be pointed out firstly that the standard of discrimination of the Equal Protection Clause of the Constitution of the United States and the Commerce clause of the United States are equal and co-terminus (*Gregg Dyeing Co. v. Query*, 286 U. S. 472 at p. 482). Thus, the conclusion of this Court in *Halliburton, supra*, that such a tax is violative of the Interstate Commerce Law would necessarily mean that it is a discrimination and in Violation of the Equal Protection Clause of the Constitution of the United States.

There are definite standards required to justify a classification, even in the field of taxation. In order to claim a greater cost of enforcement to validate this tax, there must be some evidence to show the difference in enforcement, and the additional tax must be commensurate with the additional cost (*Mullaney v. Anderson*, 342 U. S. 415). The additional tax is over twice as much as the tax for a resident paying the sales tax. Yet, the resident who purchases a car outside of New York City for all cash pays exactly the same tax as the resident who purchases the car in New York City for all cash. The only time there is a difference is when the resident makes the purchase outside of New York and pays part of the consideration with a trade-in. Thus it is apparent that the additional tax is not for enforcement but rather for discrimination. Further, the additional tax is not based upon the cost of enforcement but rather on the value of the trade-in car. So if the pur-

chaser trades in a late model Cadillac, the tax difference will be many times greater than if the purchaser trades in an old model car.

The appellee's theory is that the likelihood of resale within the City of trade-in car involved in the sales tax justifies the classification. Such theory is speculative and no factual support for this is found on the record. When such speculation as this is the basis for a classification, it is arbitrary. After all, an arbitrary classification is one in which there is no reasonable basis. If speculation, such as indulged by the Comptroller, is allowed, the need of showing fact support disappears.

The issue presented by this appeal has never been considered by this Court. Yet millions of taxpayers throughout the United States are faced with this tax. In New York State alone, the Municipalities of Auburn, Niagara Falls, Niagara Falls School District, Poughkeepsie, Syracuse and Watertown, and the Counties of Browne, Cheming Erie, Jefferson and Monroe, have similar tax statute (CCH State Tax Reporter, New York Vol. 2, Pars. 72-200 to 77-008). In addition, the following states have the same discriminatory tax. Kansas (CCH, All State Sales Tax Reporter, Vol. 2, Pars. 37-519 and 3) 604; Colorado (*ibid.* Vol. 2, Pars. 26-502 and 26-550); North Dakota (*ibid.* Vol. 3, Pars. 59-596 and 59-654); Mississippi (*ibid.* Vol. 3, Pars. 46-029 and 46-308).

These governments continue to enforce collection of this unconstitutional tax despite the well reasoned opinion in *Commonwealth* v. *Smith,* 75 Dauph. 22 (Pa. CP. 1960) (appeal withdrawn). In this case the court held that exactly the same tax imposed by the State of Pennsylvania to be an unconstitutional burden on Interstate Commerce. Further, in a well reasoned Law Review Article, concerning this precise case, the author concluded that such a tax violates the Equal Protection Clause as well, in those cases where inter-

state commerce is not involved (37 NYU Law Review 306). The author stated, at pages 314-315:

> "Computing the sales tax on the purchase price less the value of property traded-in, while denying a similar deduction in computing the use tax is an unreasonable policy. It discriminates against a class of taxpayer as well as interstate commerce, and is thus invalid as violating both the equal protection clause and where relevant, the commerce clause."

CONCLUSION

It is submitted that the position of taxpayer Milton E. Spatt, is completely sound: that no existing authority to the contrary exists anywhere: that the Constitution of the United States strikes down the position of the Comptroller of the City of New York, which is arbitrary and capricious and violative of the commerce clause of the Federal Constitution and of the Fourteenth Amendment thereof.

It is further submitted that the issues here are most substantial; that the federal questions are of nationwide importance; that this Court ought to give plenary consideration to this case to put at rest the constitutional validity of this largely used but discriminatory tax on similar residents, and that a substantial federal question (whether the taxing authority may discriminate in intrastate transactions in a manner which would be violative of the commerce clause) ought to be heard on its merits, upon a brief and oral argument, and finally decided by this high Court.

CHARLES E. BERNSTEIN,
Attorney for Appellant.

APPENDIX A

(Decision by Court of Appeals)

Judgment affirmed with costs. There was sufficient basis for classification in the different tax treatment of trade-in automobiles in transactions taking place outside the City of New York by reason of the greater cost of enforcing the compensating use tax and the greater likelihod of resale of the used car within the City of New York. We pass upon no other question.

All concur.

(Opinion by Appellate Division)

SUPREME COURT

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

NOLAN, *P. J.*, BELDOCK, UGHETTA, PETTE and BRENNAN, *JJ.*

UGHETTA, *J.*:

Pursuant to an enabling act (L. 1934, ch. 873, as amd.; McKinney's Unconsolidated Laws, §§ 9901, 9902), the City of New York has a sales tax on personalty purchased by its residents within its corporate limits (Administrative Code of City of New York, §§ N41-1.0—N41-21.0), and, complementing it, a use tax on personalty purchased by its residents without its confines (Administrative Code, §§ M41-15.0—M41-37-0). The sales tax, as originally enacted in 1934 (Local Laws, 1934, No. 20 of City of New York) was imposed on the full price. But by amendment in 1935 (Local Law, 1935, No. 29 of City of New York) Sec. 1 there was exempted from the sales tax "the credit allowed for property of the same kind accepted in part payment and intended for resale." Unlike the sales tax, the use tax is applicable

to the total consideration given or contracted to be given for such property or for its use.

Insofar as concerns the purchase of an automobile, the basic difference between the sales tax and the use tax is crystallized in Article 42 of the Regulations of the City Comptroller, entitled *Rules* and *Regulations, City Sales and Compensating Use Taxes.* It is there provided, in effect, that under the sales tax (which is collected by the vendor), if a vendor sells an automobile and accepts a trade-in for which he makes an allowance, only the balance of the price after allowance for trade-in is taxable. On the other hand, where a resident purchases an automobile without the City, he is required under Article 42 of such Rules to pay a use tax based on the total purchase price, irrespective of part payment by a trade-in. The vendor, who is not within city jurisdiction, does not collect the use tax.

Here, plaintiff, a resident of the City, purchased an automobile in this State outside of the City. He brought it back for use within the City. Instead of paying a use tax on the full purchase price, plaintiff paid a tax only on the net price or balance after deducting the allowance or credit for the trade-in value of his used car. An assessment was made against him by the City for a claimed additional tax, based on the full price.

The Special Term has granted to plaintiff a summary judgment declaring void the challenged rules and enjoining the collection of the tax on the trade-in value, holding (24 Misc. 2d 978) that these differing taxes do not afford a resident equal protection of the laws (U. S. Const., 14th Amdt., § 1; N. Y. Const., art. 1, § 11). We reach a contrary conclusion.

Since the transaction here occurred in different cities but within the same State, no issue is presented under the commerce clause as to whether the discrimination constituted an undue burden on interstate commerce (cf. *McLeod* v.

Dilworth Co., 322 U. S. 327, 330, 331; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480-482).

The principles which govern consideration of a tax, challenged as denying equal protection, are settled. The taxing authority may apply the flexibility and variety appropriate to reasonable schemes of taxation, so long as the differing classifications rest on a reasonable basis (*Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522, 526-528). If any state of facts reasonably can be conceived to sustain the distinction in taxation there is no constitutional violation (*Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357). "The question of constitutional validity disappears when it cannot be said that no state of facts reasonably justifying the classifications can be conceived" (*Matter of 436 W. 34th St. Corp.* v. *McGoldrick*, 288 N. Y. 346, 350). In the absence of proof or common knowledge to the contrary (cf. *Mullaney* v. *Anderson*, 342 U. S. 415), or in the absence of patent arbitrariness in the distinction, a rational basis for the differing classifications will be presumed (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 210).

Heavier taxes on nonresidents than on residents have been held not violative of the equal protection clause where they might be regarded as: (a) payment for rendition of public services which had been availed of (*Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510); (b) an attempt to bring back business lost as the result of a prior tax system or a means by which to defray extra cost of collection (*Madden* v. *Kentucky*, 309 U. S. 83); (c) encouragement of location within the state of useful industries (*Allied Stores of Ohio* v. *Bowers*, *supra*); or (d) a means of inducing the labor population to remain (*William* v. *Fears*, 179 U. S. 270, 276).

In *Madden* v. *Kentucky* (*supra*, p. 93), the authority of *Colgate* v. *Harvey* (296 U. S. 404) was expressly overruled. It had been held in the latter, in declaring violative of the equal protection clause an exemption from state income tax

of interest on money loaned within but not without the state, that justification for the distinction on the ground that money loaned within the state will generally be invested there, was too speculative.

In *Allied Stores of Ohio* v. *Bowers* (358 U. S. 522, *supra*) the authority of *Wheeling Steel Corp.* v. *Glander* (337 U. S. 562) was distinguished solely on the narrow ground (cf. concurring opinion, p. 533) that, in providing for taxation of accounts receivable of nonresidents but not of residents, the state had expressly set forth the purpose of the discrimination to be a scheme of reciprocity; hence, the state left no room to conceive of a rational basis for the classification.

The distinction between the sales and use taxes of the City is justifiable here on the conceivable grounds, *inter alia*, of: (1) encouragement of sales within the City (*Allied Stores of Ohio, supra; William* v. *Fears, supra*); (2) greater cost of enforcing the use tax, which involves a check on automobile registrations in all the counties of the State; and (3) probability of resale of the used trade-in automobile within the City as opposed to probability of its resale without the City (*Madden* v. *Kentucky, supra*).

The order and judgment should be reversed on the law, with $10 costs and disbursements; plaintiff's motion for summary judgment should be denied; and summary judgment in favor of the defendants dismissing the complaint, with costs, should be granted, pursuant to Rule 113 of the Rules of Civil Practice.

Nolan, *P.J.*, Pette and Brennan, *JJ.*, concur;

Beldock, *J.*, not voting.

Order and judgment reversed on the law, with $10 costs and disbursements; plaintiff's motion for summary judgment denied; and summary judgment in favor of defendants dismissing the complaint, granted, with costs.

(Decision of Mr. Justice Hart)

(Vol. 144 New York Law Journal, Page 8, July 12, 1960.)

Spatt v. City of N. Y.—The complaint herein alleges that on December 21, 1957, plaintiff purchased a motor vehicle in the City of Long Beach for a total consideration of $8,250, consisting of $3,350 in cash and a used motor vehicle valued at $4,900 by him and the vendor of the new vehicle. Plaintiff, a resident of Kings County, thereupon paid to the City of New York $100.50 representing 3 per cent of the cash consideration of the transaction as a compensating use tax, but refused to pay $197.81 as tax on the $4,900 representing the value of the vehicle traded in. On September 21, 1959, a warrant was issued to the Warrant Agent of the City of New York.

The complaint alleges that defendant City, by various officers and agents named as defendants, purportedly is acting pursuant to article 42 of the Rules and Regulations of the New York City Sales Tax and Compensating Use Tax which are invalid. It is contended that the invalidity of these regulations stems from the fact that they provide that sales within the city limits be taxed to the extent of the cash consideration involved over and above the trade-in value of an article of the same kind accepted by the vendee with the intention of resale, while in a like transaction outside of the City of New York the entire sales price is taxed at the same rate without any allowance for the trade-in value of the personal property delivered as part payment of the purchase price. It is alleged that the regulation is void since it is violative of plaintiff's rights under the State and Federal Constitution in that it denies the plaintiff the equal protection of the laws for the reason that the classification provided for is capricious, arbitrary, discriminatory and consists of class legislation in relation to plaintiff, and also deprives plaintiff of property without due process of law.

The relief demanded is a judgment declaring null and void the regulation insofar as it requires plaintiff to pay a higher tax on a vehicle purchased outside the City of New York than he would on a like purchase within the city, declaring void the warrant issued by the city and for an injunction restraining its execution.

Since the primary issue involved is the constitutionality of the regulation resort to the remedy of a declaratory judgment is most appropriate (*Dun & Bradstreet, Inc.* v. *City of N. Y.*, 276 N. Y. 198; *Comm'r of Public Charities of the City of Hudson* v. *Wortman*, 255 App. Div. 241; *Board of Education of the City of Rochester* v. *Van Zandt*, 119 Misc. 124, aff'd 234 N. Y. 644).

There being no questions of fact raised by the pleadings or by the affidavits submitted by the parties on the instant motion for summary judgment, the matter may be disposed of as a question of law.

The court is constrained to agree with plaintiff that the regulation (as well as the statute on which it is predicated, but which is not directly challenged in the complaint) discriminates against extra-territorial purchases denying the equal protection of the law to those residents of the city who consummate such transactions outside the city limits. The classification, as a tax basis, is arbitrary, capricious and discriminatory. Fundamentally the tax involves identical transactions, the only difference being in the situs thereof. It is just as discriminatory as if such transactions were exempt from tax when consummated in the city but taxed as to those consummated outside the city limits or if higher rates were applied to the latter than to the former.

The City attempts to justify its position by urging first that the sales tax and use tax are two different taxes. In its brief, however, it admits in effect that the use tax merely complements and implements the sales tax since it was "designed to prevent the loss of sales tax revenue to the

city resulting from New York City residents making their purchases outside the city" by imposing a tax on the use of such property within the city by residents. The circumstance that the sales tax and the compensating use tax were passed at different times is not conclusive. They are component parts of one tax scheme and structure (*cf. Jacobs* v. *Joseph*, 282 App. Div. 622). This is evidenced by the fact that pursuant to the statute (Administrative Code, sec. M-31-17.0 [3]) the use tax is inapplicable to any transaction on which a sales tax is payable. The City also contends that there is a reasonable basis for the distinction between the two similar transactions; that a purchase in the city involving a trade-in might result in two sales tax payments, one on the purchase of the new car taxed for the cash differential and the second when the used car was sold, whereas if the transaction were consummated outside the city the article traded-in might not be resold inside the city limits or outside the city to a New York City resident. This reasoning, however, is entirely speculative and such speculation may not be the basis for classification. The assumption that a subsequent purchaser may pay a tax in order to afford an exemption from tax within the territorial limits of the jurisdiction of the taxing authority has been held to be so speculative as to preclude the validity of the differential or exemption created by a taxing statute (*People* v. *Carpenter*, 2 Ill. 2d 468). There the use tax was placed on motor vehicles purchased in other jurisdictions by residents of Illinois but none was imposed on those purchased from dealers in Illinois. The justification for the exemption to the latter was on the "tacit assumption that such dealers have paid the retailers occupation tax * * * and on the further assumption that such tax was passed on to the purchaser. These are pure assumptions" (pp. 373-374). The court rejected this argument on the ground that there was no proof that the tax was passed on to resident purchasers. Similarly here, the basis for exemption from taxation of part of the consideration where the transaction is consum-

mated in the City of New York is based on "tacit assumption" which is patently speculative and, accordingly, may not be the basis for the discriminatory effect of the tax.

There being no valid basis for the classification established, plaintiff is accordingly entitled to judgment. Settle judgment on notice.

APPENDIX B

(Statutes Involved)

TITLE M

ARTICLE 2

COMPENSATING USE TAX

§ M41-16.0 Imposition of tax.—

b. On and after June twenty-fourth, nineteen hundred forty-nine, there is hereby imposed and there shall be paid by every person a tax on the use within the city (1) of any tangible personal property purchased at retail, (2) of any tangible personal property however acquited where not acquired for purposes of resale, if improved, refashioned or enhanced in value by the performance of processing services upon said property by another, and (3) of any information services involving the furnishing of printed, mimeographed, multigraphed matter or matter duplicating written or printed matter in any other manner, other than professional services and services of employees, agents or other persons acting in a representative or fiduciary capacity, or information services furnished to newspapers. Such tax shall be at the rate of two per centum until April thirtieth, nineteen hundred fifty-one, and on and after May first, nineteen hundred fifty-one, at the rate of three per centum of the consideration given or contracted to be given for such property and for such processing or information services, or for the

use of such property, plus the cost of transportation except where such cost is stated and charged separately. "Processing services" shall mean and include the services of producing, fabricating, processing, printing and, except for the imprinting of copy upon an already printed product, imprinting performed upon the tangible personal property of another, other than the services rendered in connection with the repair, alteration or reconditioning of such tangible personal property to refit it for the use for which it was originally produced. "Information services" shall mean and include all services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons (Subd. b amended by L. L. 1959, No. 54, July 1).

---

§ N41-1.0 Definitions.—When used in this title the following terms shall mean or include:

* * * * *

4. "Receipt." The amount of the sale price of any property or the charge for any service specified in section N41-2.0 of this title valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any * * *

§ N41-2.0. Imposition of tax.—a. On and after July first, nineteen hundred thirty-eight and ending on June thirtieth, ninteen hundred fifty-five, there shall be paid a tax upon the amount of the receipts from every sale in the city, as follows:

(Opening par. amended by L. L. 1952, No. 71, July 1; L. L. 1953 No. 61, July 1.)

1. Two percent upon the amount of the receipts from every sale of tangible personal property sold at retail, except those articles described in schedule "A" of this section. * * *

SALES TAX

Article 42 of the Rules and Regulations of the New York City Sales Tax and Compensating Use Tax:

(A) Sales Tax on purchases within the city:

"Where tangible personal property is sold at retail and credit is allowed for property of the same kind of which is accepted by the vendor in part payment of the sales price and is intended for resale by the vendor, the sales tax is to be computed upon the net receipts after deduction of the trade-in-allowance."

(B) Compensating Use Tax on purchases without the city:

"Where tangible personal property, the use of which is subject to the Compensating Use Tax, is purchased at retail and credit is allowed for other property which is accepted by the vendor in part payment of the sales price, the Use Tax is to be computed upon the total selling price of the property sold without any allowance for the property accepted by the vendor as part payment, notwithstanding that the property accepted is intended for resale by the vendor."

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 4 1963
JOHN F. DAVIS, CLERK

(37300)

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1963

No. 562

MILTON E. SPATT,

Appellant,

v.

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellees,
Municipal Building,
New York 7, N. Y.

STANLEY BUCHSBAUM,
SOLOMON PORTNOW,
of Counsel.

INDEX

	PAGE
Preliminary Statement	1
Statutes and Regulations Involved	2
Statement of the Case	3
Facts	4
POINT I—The challenge to the constitutionality of the New York City use tax and Article 42 of the Comptroller's Regulations presents no substantial federal question either under the Commerce Clause or the Due Process Clause of the Federal Constitution	4
POINT II—The different tax treatment of trade-ins under the compensation use tax and the sales tax as applied to wholly local transactions and transactions occurring outside the City but within the State of New York is based on reasonable distinctions and does not deny the equal protection of the laws	6
Conclusion	10

CASES CITED

Alaska Fish Co. v. Smith, 255 U. S. 44, 48-49 (1921)	5
Allied Stores of Ohio v. Bowers, 358 U. S. 522 (1959)	8
American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95 (1900)	8
Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232 (1890)	7

PAGE

Bode v. Barrett, 344 U. S. 583, 585 (1953) 5

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 511 (1937) 8

Citizens' Telephone Co. v. Fuller, 229 U. S. 322, 329 (1913) 7

Colgate v. Harvey, 296 U. S. 404, 419-422 (1935) 8

Commonwealth v. Smith, 75 Dauph. 22 (Pa. CP., 1960) 5

Florida Avocado Growers v. Paul, 373 U. S. 132, 152-156 (1963) 10

Fox v. Standard Oil Co., 294 U. S. 87, 99-100 (1935) 5

Gregg Dyeing Co. v. Query, 286 U. S. 472 (1932) 3, 9, 10

Haavik v. Alaska Packers Assn., 263 U. S. 510, 515 (1924) 8

Halliburton Oil Well Cementing Company v. Reily, 373 U. S. 64 (1963) 3, 4, 10

Hart Refineries v. Harmon, 278 U. S. 499, 502 (1929) 7

Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 614-615 (1899) 5

Kidd v. Alabama, 188 U. S. 730, 732 (1903) 8

Klein v. Board of Supervisors, 282 U. S. 19, 22-23 (1930) 8

Lawrence v. State Tax Comm., 286 U. S. 276 (1932) 7, 9

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78 (1911) 7

Madden v. Kentucky, 309 U. S. 83, 88-90 (1940) 8

Magnano Co. v. Hamilton, 292 U. S. 40, 44 (1934) 5

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293 (1898) 7

PAGE

Metropolitan Co. v. Brownell, 294 U. S. 580, 584-585 (1935) 9

Mullaney v. Anderson, 342 U. S. 415 (1952) 8, 9

N. Y. Rapid Transit Corp. v. City of New York, 303 U. S. 573, 578 (1938) 7

Norton Co. v. Dept. of Revenue, 340 U. S. 534, 537-538 (1951) 9

Quong Wing v. Kirkendall, 223 U. S. 59, 62 (1912) .. 8

Rast v. Van Deman & Lewis, 240 U. S. 342, 357 (1916) 7, 9

Southwestern Oil Co. v. Texas, 217 U. S. 114, 126-127 (1910) 7

Travellers' Ins. Co. v. Connecticut, 185 U. S. 364 (1902) 8

United States v. Sanchez, 340 U. S. 42, 44 (1950).... 5

Watson v. State Comptroller, 254 U. S. 122, 125 (1920) 8

STATUTES CITED

State Enabling Act (Chapter 873 of the Laws of 1934, as amended [McKinney's Unconsolidated Laws, § 9431]) 6

LOCAL LAWS CITED

Title M, Art. 2 of Chapter 41 of the Administrative Code of the City of New York 2

Title N of Chapter 41 of the Administrative Code of the City of New York 2

In the

Supreme Court of the United States

NOVEMBER TERM, 1963

No. 562

Milton E. Spatt,

Appellant,

v.

The City of New York, Lawrence E. Gerosa, as Comptroller of the City of New York, Hilda G. Schwartz, as Treasurer of the City of New York and William Lefkowitz, as Warrant Agent of the City of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

Preliminary Statement

The petitioner has appealed from a judgment of the Court of Appeals of the State of New York, dated May 2, 1963, unanimously affirming an order and judgment of the Appellate Division of the Supreme Court of that State, which Court had unanimously reversed an order and judgment of the New York Supreme Court.

The memorandum opinion of the Court of Appeals is officially reported in 13 N Y 2d 618. The opinion of the Appellate Division is officially reported in 14 A D 2d 30 and the opinion of the Supreme Court in 24 Misc 2d 978. All of these opinions are set forth in Appendix A of the appellant's jurisdictional statement.

By this appeal the appellant challenges the constitutional validity of the tax treatment of traded-in cars under the New York City Compensating Use Tax Law. Under this law, which is applied equally to all New York City residents, the use tax is computed on the entire purchase price, including the value of a traded-in article, where property is purchased outside the City but within the State of New York and brought into the City and used here. Under the New York City Sales Tax Law, the tax is not applied to the value of the trade-in, but only to the cash payment made where the transaction occurs within the territorial limits of New York City. The appellant contends that the tax, to the extent that it is applied differently under the two tax laws, is repugnant to the Equal Protection and Due Process Clauses of the Federal Constitution.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes and Regulations Involved

The laws imposing the Use Tax and the Sales Tax and the Regulations of the Comptroller of the City of New York issued thereunder are set forth in Appendix B of appellant's jurisdictional statement. The local law of the City of New York imposing the Compensating Use Tax is Title M, Art. 2 of Chapter 41 of the Administrative Code of the City of New York; the local law imposing the Sales Tax is Title N of Chapter 41 of the Administrative Code of the City of New York.

Statement of the Case

This action was brought by the appellant for a declaratory judgment declaring that the different tax treatment of traded-in cars under the New York City sales tax and compensating use tax and the regulations promulgated thereunder violates the Equal Protection, Due Process and the Privileges and Immunities clauses of the Federal Constitution. After issue was joined, both sides moved for summary judgment.

The trial court granted appellant's motion, denied appellees' motion and entered an order and judgment declaring the use tax unconstitutional as applied to a trade-in transaction occurring outside the City of New York. Upon appeal, the Appellate Division, Second Department, unanimously reversed the order and judgment of the trial court. The New York Court of Appeals unanimously affirmed the decision of the Appellate Division.

The Appellate Division wrote an opinion and the Court of Appeals wrote a memorandum opinion. Both held that there was a reasonable basis for the different tax treatment by reason of the greater cost of enforcing the compensating use tax and the greater likelihood of the resale of the used car within the City. The trial court wrote an opinion and held the different tax treatment unconstitutional because it was predicated upon reasoning that is "speculative."

In all courts, appellant relied upon *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932). On this appeal, appellant relies principally on the *Gregg* case and on *Halliburton Oil Well Cementing Company* v. *Reily*, 373 U. S. 64 (1963). It is conceded that interstate commerce is not involved in the instant case.

Facts

Appellant, a resident of New York City, purchased a Lincoln automobile in the City of Long Beach, State of New York, for $8,250 and brought it back with him for use within New York City (fols. 41 42, 87-88, 124). In making the purchase, appellant traded in his used car and received a credit of $4,900 therefor (fol. 66, Exh. A, opp. p. 18, Rec.). He paid the balance of $3,350 in cash (*ibid.*).

Instead of paying compensating use tax on the full amount of the purchase price as required by the local tax law and the regulations, appellant paid a use tax of $100.50 computed on the cash amount alone (fol. 42). Consequently, the Comptroller of the City of New York assessed appellant for use tax due on the balance of the purchase price, viz.: $4,900.

We concede that had the appellant made this type of purchase either within the City of New York or outside the State of New York, the sales tax would have been computed only on the cash consideration paid.

POINT I

The challenge to the constitutionality of the New York City use tax and Article 42 of the Comptroller's Regulations presents no substantial federal question either under the Commerce Clause or the Due Process clause of the Federal Constitution.

(1)

Appellant relies upon *Halliburton Oil Well Cementing Company* v. *Reily*, 373 U. S. 64 (1963), which held unconstitutional a use tax to the extent that it resulted in a greater tax on an out-of-state purchase than on a purchase made within the state. We concede that the New

York City use tax and Article 42 of the Comptroller's Regulation can not be applied to an out-of-state transaction involving a traded-in car. In such a case, the City's tax would have to be computed on the cash consideration alone, in the same manner as in the case of a similar local purchase occurring within the territorial limits of New York City.

The case at bar, however, does not involve an out-of-state purchase. It involves an intrastate transaction and, hence, the Commerce Clause is inapplicable.

So, too, the case of *Commonwealth* v. *Smith*, 75 Dauph. 22 (Pa. Ct., 1960), upon which appellant relies, is inapposite because it involved an out-of-state purchase. Hence, no substantial federal question is presented under the Commerce Clause.

(2)

Nor does appellant's argument that the City's use tax and Article 42 of the Regulations as applied to an intrastate transaction violate the Due Process clause, present any substantial federal question.

This Court has held that the Due Process clause may not be used to cut down the sovereign power of a state to tax unless, in substance and effect, that power is used merely as a subterfuge for the exercise of a different and forbidden power. *Bode* v. *Barrett*, 344 U. S. 583, 585 (1953); *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44 (1934); *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615 (1899). See, also, *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 99-100 (1935). Nothing less than complete subversion of the taxing power will warrant judicial interference with this clause. And this is so even though refusal to strike down a tax under the due process clause might result in destroying a particular business. *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49 (1921). *Cf. United States* v. *Sanchez*, 340 U. S. 42, 44 (1950).

Clearly, it is the taxing power and no different or forbidden power which is involved in the New York City use tax law assailed by appellant. The use tax was enacted as an exercise of the taxing power. It was not motivated by any purpose other than to impose a tax and to protect the municipality's sales tax revenue.

POINT II

The different tax treatment of trade-ins under the compensating use tax and the sales tax as applied to wholly local transactions and transactions occurring outside the City but within the State of New York is based on reasonable distinctions and does not deny the equal protection of the laws.

(1)

At the outset it should be noted that Article 42 of the Regulations is in accord with the local tax statutes and that the tax laws themselves are within the authority of the State Enabling Act (Chapter 873 of the Laws of 1934, as amended [McKinney's Unconsolidated Laws, § 9431]). This is the holding of the New York Court of Appeals in the case.

Thus the different tax treatment is valid under State law. It remains to be demonstrated that the different treatment is based upon reasonable distinctions sanctioned under the Equal Protection clause.

(2)

It might be emphasized that appellant is a resident of New York City. The sales tax-use tax scheme embraced by the local legislation accords the same treatment to all New York City residents. Thus, to the extent that appellant was required to pay use tax on the full consideration of the new car, without deducting the value of the traded-in automobile because the purchase was made in an ad-

joining county but within the State of New York, he was treated no differently than other New York City residents. Had he purchased the automobile within the City of New York, the sales tax would have been computed on the cash consideration alone, the same as for other residents.

It is well settled by this Court that the equality demanded under equal protection is that persons and property in the same class must be treated alike. Equality between different classes is not constitutionally required. *Hart Refineries* v. *Harmon*, 278 U. S. 499, 502 (1929); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293 (1898). Under this aspect of the case, no substantial federal question is presented with respect to the class of persons or the property to which the different tax treatment is applied.

(3)

It is axiomatic that a tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. *N. Y. Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938). In taxation there is a broader power of classification than in some other exercises of legislation. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329 (1913). Hence, if any reasonable purpose for the different tax treatment *could* have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357 (1916); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232 (1890); *Lawrence* v. *State Tax Comm.*, 286 U. S. 276 (1932).

It is not necessary that the purpose be known with any certainty, nor need it be declared by the legislature. *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126-127 (1910).

In the case at bar it is conceivable that the legislature reasonably might have had in mind any of the following considerations in providing different tax treatment for out-

of-city trade-in transactions:

(1) the greater expense and trouble of collecting the use tax, as compared with the comparatively simple procedures for enforcing the sales tax, since local vendors are required to register with the Director of Finance, file quarterly returns and submit to periodic audit, whereas out-of-city vendors are not. *Madden* v. *Kentucky*, 309 U. S. 83, 88-90 (1940); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511 (1937);

(2) to equalize or adjust the tax burdens .Thus, a purchase within New York City involving a trade-in normally results in two sales tax payments, *i.e.*, on the original transaction and again when the trade-in is resold in the City. Both add up to one full tax. The same purchase made outside the City normally results in a single use tax payment because the trade-in, normally, is resold outside the City, with no tax revenue accruing to the City. Thus, in effect, the different treatment under the use tax and the sales results, in each instance, in the realization by the City of one full tax. *Colgate* v. *Harvey*, 296 U. S. 404, 419-422 (1935); *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364 (1902); *Watson* v. *State Comptroller*, 254 U. S. 122, 125, (1920). See, also *Kidd* v. *Alabama*, 188 U. S. 730, 732 (1903); *Klein* v. *Board of Supervisors*, 282 U. S. 19, 22-23 (1930).

(3) to encourage local business or to promote local interests. Clearly, a lower tax on a transaction had within the City provides a strong incentive to use the local market and thus encourages local business. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95 (1900); *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62 (1912); *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510, 515 (1924); *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522 (1959);

(4)

Appellant's reliance upon *Mullaney* v. *Anderson*, 342 U. S. 415 (1952), to support the view that it was incumbent

upon appellees to adduce evidence of higher enforcement costs is ill-founded. In a constitutional attack on a tax statute, the burden of proof is on the party seeking to invalidate the law. Where the record is silent, the Court is not required to assume facts to the contrary or that there are no facts that reasonably can be conceived to furnish the rational basis for the legislative action. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283 (1932); *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584-585 (1935). The burden is never met merely by showing a fair difference of opinion which as an original matter might have been decided differently. *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 537-538 (1951). As stated by this Court in *Rast* v. *Van Deman & Lewis*, 240 U. S. 342 (1916) (at p. 357):

> "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competence of the courts to arbitrate in such contrariety. *Chi., Burl. & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 413, 414; *Price* v. *Illinois*, 238 U. S. 446, 452."

In the *Mullaney* case the taxpayer met the burden by interrogatories and cross-examination, which resulted in a specific disclaimer by the Tax Commissioner of any knowledge of the dollar cost of enforcement (342 U. S. at pp. 418-419). Not so in the case at bar. Moreover, the *Mullaney* case is otherwise inapposite because it involved an interstate transaction which was decided under the Privileges & Immunities clause, Art. IV, § 2, and not under the Equal Protection clause (342 U. S. at p. 417).

(5)

The appellant asserts that "the standard for discrimination" under the Commerce Clause and under the Equal Protection Clause "are equal and co-terminus" (Juris. St., p. 8). It cites *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932), in support of this proposition. Based on this as-

sumption, the conclusion is reached by the appellant that the holding in the *Halliburton* case that there was discrimination barred by the Commerce Clause is determinative of the equal protection question in the case at bar.

Invalid discrimination under the Commerce Clause, however, is not the equivalent of a denial of equal protection of the laws. The *Gregg* case does not so hold. That case upheld the tax and, after stating why the tax did not discriminate against interstate commerce, stated that the same reasoning showed that there was no denial of equal protection (286 U. S. at p. 482). It may well be that discrimination which denies equal protection will, when applied to interstate commerce, necessarily constitute discrimination violative of the Commerce Clause, but it does not follow that the converse is true. That it is not is shown by the recent case of *Florida Avocado Growers v. Paul*, 373 U. S. 132, 152-156 (1963), where this Court rejected the equal protection attack, but, nevertheless, held that a new trial was required with regard to the issue whether there was discrimination against interstate commerce.

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

November 1, 1963.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellees,
Municipal Building,
New York 7, N. Y.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1963

No. 562

MILTON E. SPATT,

Appellant,

—against—

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS APPEAL

CHARLES E. BERNSTEIN,
Attorney for Appellant,
16 Court Street,
Brooklyn, New York 11201

Tel. TR 5-8352

INDEX

PAGE

Preliminary Statement 1

Statement of the Case 2

POINT I—The discriminatory tax which imposed a higher tax on appellant, a New York City resident, who made an intrastate purchase outside New York City, than on a resident who makes an identical interstate purchase or city wide purchase, is violative of the equal protection clause of the 14th Amendment to the Constitution of the United States 4

Conclusion 7

TABLE OF CASES

Haliburton Oil Well Cementing Co. v. Reily, 373 U. S. 64 (1963) 3

Louis K. Liggett & Co. v. Lee, 288 U. S. 517 (1932) 4

Mullaney v. Anderson, 342 U. S. 415 (1952) 6

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1927) 4

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1963

No. 562

MILTON E. SPATT,

Appellant,

—against—

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS APPEAL

PRELIMINARY STATEMENT

The appellant herein appeals from a judgment of the Supreme Court of the State of New York entered May 22, 1963, pursuant to the remittur of the Court of Appeals of the State of New York, dated May 2, 1963.

The Court of Appeals affirmed the decision of the Appellate Division of the Supreme Court, Second Judicial De-

partment. The Appellate Division had previously reversed the order and judgment of the Supreme Court of the State of New York, County of Kings.

The decisions are correctly cited in appellant's Jurisdictional Statement and set forth in full in the appendix thereto (pp. A-1 to A-8).

STATEMENT OF THE CASE

Appellant in this action, seeks a judgment declaring the compensating use tax to be unconstitutional. It is appellant's contention that the tax as applied herein, is violative of the Equal Protection clause and Due Process clause of the 14th Amendment to the Constitution of the United States.

The appellant, a resident of the City of New York, purchased a Lincoln automobile in the City of Long Beach, State of New York, for the sum of $8,250.00, and brought the automobile back to New York City to be used there. In making the purchase, appellant traded in his used car and received a credit of $4,900.00 against the purchase price. He paid the balance, $3,350.00 in cash.

Appellant paid a compensating use tax of $100.50, based upon the cash paid on the purchase of the automobile.

The City of New York, through its Comptroller and Treasurer, assessed appellant the additional sum of $197.81. This latter sum was based upon the difference between what appellant paid and the tax computed on the entire purchase price, together with penalties.

It is admitted that if the sale were made within the City of New York, or involved an interstate transaction, there would be no additional tax due to the City.

In all the Courts below, contrary to its present position, respondent argued that the compensating use tax applied

to all purchases of residents of the City of New York made anywhere outside the City of New York. Indeed, the plain meaning of the statute, Title M, Article 2 of Chapter 41 of the Administrative Code of the City of New York, and Article 42 of the Comptroller's Regulations (Appellant's Jurisdictional Statement, pp. A-8, A-10), the compensating use tax applies to all purchases made by New York City residents outside of the city, including interstate purchases.

After the decision of the Court of Appeals of the State of New York, rejecting appellant's contention herein, the Supreme Court of the United States handed down its landmark decision in the case of *Haliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64 (1963).

In that case, it was held to be an unconstitutional burden on interstate commerce to impose a greater use tax on an article, than the taxing authority imposed on the same article by virtue of the sales tax. Recognizing the full impact of the *Haliburton* case, the appellee now frankly admits that this tax can now no longer be applied to an interstate transaction (Appellee's motion to dismiss, p. 5).

Yet, the appellees still maintain that they can impose this admittedly discriminatory tax upon the appellant solely because it is an intrastate transaction. Such rationale is indeed staggering.

POINT I

THE DISCRIMINATORY TAX WHICH IMPOSED A HIGHER TAX ON APPELLANT, A NEW YORK CITY RESIDENT, WHO MADE AN INTRASTATE PURCHASE OUTSIDE NEW YORK CITY, THAN ON A RESIDENT WHO MAKES AN IDENTICAL INTERSTATE PURCHASE OR CITY WIDE PURCHASE, IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This is essentially a question of classification. If the classification of the tax statute is not based upon substantive difference, the tax must fail. As was said in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389 (1927), a tax is unconstitutional which—

> " * * * fails to meet the requirements that a classification to be consistent with the Equal Protection clause must be based on a *real and substantive difference having reasonable relation to the subject of the legislation.*"
>
> *Louis K. Liggett & Co.* v. *Lee*, 288 U. S. 517 (1932).

As justification for the tax, the City puts forward the following grounds:

1. Greater expense and trouble of collection of the use tax because local vendors filed quarterly returns and out of city vendors are not so required.

2. To equalize or adjust the tax burden because when a sale is made in New York City, the traded in car will also be sold within the City resulting in a sales tax on the second purchase.

3. To encourage local business which are benefited by the admitted discriminatory tax.

These bases are not "real and substantive", as required by *Quaker City, supra.* In fact, they are not even factually correct. This is especially so when it is conceded that interstate transactions are not burdened by this discriminatory tax. Certainly there is no greater expense in enforcing the collection of a tax of a California purchase than in a purchase made in the City of Long Beach, New York, just a few miles of the City of New York.

The second explanation is equally fallacious. There is a greater likelihood, not less, that there will be a second sale to a New York City resident when the car is traded in within a few miles of New York City, as in this case, than when the car is traded in in a completely foreign state, perhaps thousands of miles away.

Lastly, it does not even encourage sales within New York City, because the sales made in interstate commerce are also, admittedly, not taxed as provided in the compensating use tax. Thus, even the very explanation of the appellees do not withstand scrutiny.

While the Court of Appeals in its decision allowed the foregoing as a basis for the classification, it must be remembered that it was before the decision of this Court in *Haliburton,* and at a time when the appellees were still contending that this discriminatory use tax was valid as to interstate transactions.

It is inconceivable that the Court of Appeals would maintain that the extra cost of enforcement and likelihood of resale within the City of New York, were a legal basis for the classification if appellees had then conceded that the compensating use tax was not applicable to the interstate transaction. Such a result would be beyond all reason.

The appellees in support of a decision below, say that there is no need to show higher cost of enforcement. Assuming, arguendo, that such is so, there must still be some correlation between the increased tax and the cost of en-

MICRO CARD 22
TRADE MARK ®
PC 75
MATTHEW BENDER & COMPANY
MB
6-64
microcard

forcement. In the taxing statute under consideration herein, the increase is based solely upon the value of the traded in article. When no article is traded in the tax is equal. The tax increases in direct proportion to the value of the traded in article.

The statute must fail because it appears on its face that there is no correlation between the cost of enforcement and the increase in the tax. *Mullaney* v. *Anderson,* 342 U. S. 415 (1952).

It is not appellant's contention that every discriminatory burden on interstate commerce is automatically a violation of the Equal Protection clause. If that were so, there would be no further need for the Interstate Commerce clause. However, it is appellant's contention that *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472 (1932), stands for the proposition that a *tax* which is discriminatory under the Interstate Commerce clause is also a violation under the Equal Protection clause. Under circumstances of classification such as these, it logically follows that when a large segment of a classification is eliminated as here because of a violation of the Interstate Commerce clause, the remainder of the clause would have no "real and substantive" basis. There can be no justifiable bases to formulate a clause comprised solely of persons engaged in intrastate commerce, where the same conditions exist on interstate commerce.

In the instant case, the taxing authority goes even further and discriminates against only a certain part of the intrastate purchase without any rational bases for the classification.

In considering the validity of this tax, it must be remembered that the sole purpose thereof is to complement the sales tax. This was admitted by the appellees (Appellees' motion to dismiss, p. 6).

CONCLUSION

THERE IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL TO WHICH THE COURT SHOULD GIVE PLENARY CONSIDERATION.

Respectfully submitted,

CHARLES E. BERNSTEIN,
Attorney for Appellant.

Office-Supreme Court, U.S.
FILED
NOV 23 1963
JOHN F. DAVIS, CLERK

(37331) LIBRARY

IN THE

Supreme Court of the United States

November Term, 1963

No. 562

MILTON E. SPATT,

Appellant,

v.

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLEES' REPLY ON MOTION TO DISMISS APPEAL

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellees,
Municipal Building,
New York 7, New York.

STANLEY BUCHSBAUM,
SOLOMON PORTNOW,
of Counsel.

IN THE

Supreme Court of the United States

November Term, 1963

No. 562

MILTON E. SPATT,

Appellant,

v.

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLEES' REPLY ON MOTION TO DISMISS APPEAL

(1)

The appellant, in his brief opposing the motion to dismiss the appeal, raises a new argument in support of his contention that he has been denied the equal protection of the laws. He asserts that the City's admission that the decision in *Halliburton Oil Well Cementing Company* v. *Reily*, 373 U. S. 64 (1963), bars the imposition of the use

tax without deducting the credit for the traded-in article when the purchase is made in another state furnishes an additional ground for his contention that he has been denied equal protection. He states that there is no reasonable basis for distinguishing between a purchase made in another state and a purchase made in the State of New York outside the City of New York.

The appellant either overlooks or disregards the fact that the local tax law applies alike to all motor vehicles used by a resident in the City of New York after purchase outside the City except to the extent that this Court's ruling has required a limitation based on the Commerce Clause with regard to vehicles purchased in another state.

On several occasions this Court has rejected equal protection arguments based on discrimination resulting from Commerce Clause or other constitutional restrictions on the right to tax persons situated similarly to those upon whom the tax is imposed. *Packer Corporation* v. *Utah*, 285 U. S. 105, 109-110 (1932); *Union Bank & Trust Co.* v. *Phelps*, 288 U. S. 181, 186-187 (1933).

In *Raley & Bros.* v. *Richardson*, 264 U. S. 157 (1924) this Court said (pp. 159-160):

> "There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon those engaged in domestic business and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the Fourteenth Amendment to say that because a State is forbidden by paramount law to impose a tax upon

some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the State observe the rule of equality among the persons subject to its taxing power."

Conclusion

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

November 21, 1963.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellees,
Municipal Building,
New York 7, New York.

STANLEY BUCHSBAUM,
SOLOMON PORTNOW,
of Counsel.

MICROCARD
TRADE MARK ®
22

PC 752

MATTHEW BENDER & COMPANY
MB
6-49-64

microcard